Matador Lines, Inc. *and* Teamsters Local 517, International Brotherhood of Teamsters, AFL–CIO. Case 32–CA–14136

February 27, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On April 30, 1996, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Matador Lines, Inc., Vacaville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for participating in a strike or engaging in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed.

(b) Make Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Vacaville, California facility and at the S & K Cannery in Lemoore, California, and all places where it may conduct operations copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 11, 1994.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's decision, we find that the strikers made an unconditional offer to return to work prior to the hiring of any replacements. We agree with the judge that the strikers made an unconditional offer to return when they told Aksland that they had agreed to accept his offer to increase their wages, and that they wanted to return to work. We also find that, even if they had not made such an offer, the Respondent discharged them in violation of the Act when it informed them that it considered them as having quit. See *Modern Iron Works*, 281 NLRB 1119 (1986); *Seminole Mfg. Co.*, 272 NLRB 365 (1984). We find it unnecessary to rely on *American Linen Supply Co.*, 297 NLRB 137 (1989), in which the employer unlawfully discharged striking employees by telling them that they had been permanently replaced when they had not been replaced.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, or any other employee, for participating in a strike or engaging in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Jesus Alvarez, Ruben Cisneros, Jaime Guiterrez, Ignacio Estrado, Alvaro Espinoza, Isauro Giron Alvarado, Edmanuel Garner, Rigoberto Reyes, Richardo Rodriguez, Adolfo Garcia, Lioncio Gonzales, Juan Garcia, Israel Burgos, and Margarito Sierra, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

MATADOR LINES, INC.

Daniel Altemus, Esq., for the General Counsel.
Donald O. Spaulding, Esq. (Clemons & Spaulding), of El Dorado Hills, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. On August 11, 1994,[1] Teamsters Local 517 filed an unfair labor practice charge against Matador Lines, Inc. (Matador). On October 20 the Regional Director for Region 32, acting for the General Counsel of the National Labor Relations Board, issued a complaint and notice of hearing against Matador. I heard the case in trial in Fresno, California, on January 31 and February 1, 1995. Counsel for the General Counsel and counsel for Matador submitted posttrial briefs.[2]

Summary of the Parties' Contentions; the Central Issue

The complaint alleges in its single substantive count that Matador violated Section 8(a)(1) of the Act[3] when, "on or about July 25," it "discharged" 14 named truckdriver-employees[4] because they "engaged in protected concerted activities . . . including but not limited to their seeking a wage

[1] All dates below are in 1994 unless I say otherwise.

[2] Charging Party Local 517 made no appearance at the trial through any representative. Its original charge had identified the law firm of Van Bourg, Weinberg, Roger, and Rosenfeld—and specifically, David A. Rosenfeld of that firm—as its attorneys. In a letter to me dated February 17, 1995, after the trial, and before any briefs had been submitted, attorney Rosenfeld requested that I note his appearance as counsel for Local 517, and advised that he "joined in the positions advanced by the General Counsel as well as the brief to be filed by the General Counsel."

[3] Sec. 8(a)(1) bans employer behavior that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in Section 7. . . ."

Section 7 declares pertinently that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"

[4] Using spellings which in some cases are questionable (indicated by italics) the complaint names the following employees as having been unlawfully discharged on July 25, and Matador admits that they were drivers in its employ as of that date:

Jesus Alvarez	Rigoberto Reyes
Ruben Cisneros	*Richardo* Rodriguez
Jaime *Guiterrez*	Adolfo Garcia
Ignacio Estrado	Lioncio Gonzales
Alvaro Espinoza	Juan Garcia
Isauro Giron Alvarado	Israel Burgos
Edmanuel Garner	Margarito Sierra

increase." In fact, the protected activity in question was a work stoppage conducted by the drivers on the evening of Monday, July 25, in support of their demands for a pay raise from $10 per load to $20 per load on runs to the "Schwartz Fields." The General Counsel would have me find that Matador's operations manager, Richard Aksland, told the drivers during their second meeting that evening that they would be "fired" if they did not get back in their trucks and start making hauling runs. However, the General Counsel also seeks findings that the drivers "unequivocally offered to return to work" during a third meeting with Aksland later in the evening, on terms offered earlier by Aksland, and that Aksland effectively cemented the deal by telling them when to report to work the next day, but that Matador's president and owner, James Burke, reneged on this deal the next day, when he admittedly flew down from company headquarters and told the drivers instead that inasmuch as they had "quit," he was bringing in owner-operators to take over their jobs for the balance of the tomato harvest season.

Matador's answer, as amended at the trial, admits that the Board's jurisdiction is properly invoked, and I so find.[5] But Matador has at all times denied that it "discharged" the named drivers or otherwise treated them unlawfully. In its answer, Matador's attorney affirmatively averred as a defense that the drivers in question had "voluntarily resigned." (Moreover, at trial, the parties stipulated that Matador took the same position—that the drivers had "voluntarily quit"—in response to applications for California unemployment compensation filed by some of the drivers after the owner-operators took over.) In its posttrial brief, however, Matador has shifted ground; its counsel now dismisses any statements by company agents that the drivers had "quit" as "generic personnel descriptions," deserving of "little weight." Instead, Matador's counsel not only concedes that the drivers were engaged in a protected strike at material times, but now insists on the point; indeed, he now seeks a finding that the drivers were still on strike as of July 26, and had made no unconditional offer to return to work before Burke "replaced" them, lawfully, with owner-operators.

I agree with Matador's counsel to the extent he seems to acknowledge that when company agents characterized the drivers' actions as "quits" (or when counsel himself averred in Matador's answer that the drivers had "voluntarily resigned"), these characterizations were far off the mark. For reasons noted in due course, however, I think the fact that Matador's agents variously made such declarations deserves more weight in understanding Matador's actions and motives than its counsel would now assign to such statements. Nevertheless, at bottom, I think the pivotal issue in the case is the one suggested by Matador's counsel on brief: Did the drivers in question still occupy status as strikers at the point on July 26 when Burke admittedly "replaced" them with owner-operators? If they were still maintaining a strike at that point, then their replacement would presumably be a lawful exercise. If, on the other hand, they had already expressed their unconditional willingness to return on the basis of Aksland's proposed terms of July 25, then their "replacement" by Matador would serve no legitimate business purpose, and would amount to nothing more than punishment for their having engaged in a protected strike.[6]

I find, based on the details of fact and the further reasoning set forth below, that the drivers did, indeed, accept on July 25 the terms proposed by Aksland for getting them to resume work, and, therefore, that they were not on strike on July 26 when Burke called in the owner-operators to replace them. Accordingly, I judge that Matador violated Section 8(a)(1) by effectively discharging them in punishment for their having previously engaged in a work stoppage protected by Section 7 of the Act, or out of fear that they might in the future engage in such protected conduct.

FINDINGS OF FACT

I. INTRODUCTION

A. *Some General Observations Bearing on My Findings*

Although the formal and abstract wording of the parties' respective pleadings tended to obscure the underlying realities, and the testimonial conflicts among the witnesses about certain details have introduced further confusion and distraction, the parties appear to have emerged from the trial in agreement on some basic facts, including most of those I narrate below.[7]

The General Counsel called six witnesses during the trial, all of them former Matador drivers. Matador called two witnesses, Operations Manager Aksland and the company's president and owner, Burke. Four of the General Counsel's witnesses—Jesus (Chuy) Alvarez, Isauro Alvarado Giron (hereafter, Alvarado); Rigoberto (Rigo) Reyes, and Lioncio Gonzales—were drivers involved in most of the material events on the evening of July 25, principal among which were three separate meetings held between the drivers and Operations Manager Aksland within the period approximately 6:15–9:30 p.m. Alvarez, Alvarado, and Reyes also

[5] At trial, after the General Counsel amended the complaint in minor respects, Matador admitted, and I find, as follows: Matador, a California corporation, transports agricultural products by truck. In the year before the complaint issued, Matador purchased and received more than $50,000 worth of goods from California sellers or suppliers who, in turn, received such goods in substantially unchanged form directly from outside California.

[6] In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), the Supreme Court summarized the pertinent rules of law this way:

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§7 and 13 of the Act. . . . Under §8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights Accordingly, unless the employer who refuses to reinstate strikers can show that his actions were due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. Ibid.

[7] My findings for the most part are a composite derived from harmonious or undisputed elements in the testimony of several of the witnesses. No single witness offered an entirely persuasive account of all relevant events, and the witnesses shared in common a certain vagueness or uncertainty as to the precise sequence of material events. The sequence I lay out below is based on my own sense of the probabilities in the light of agreed-on facts. My findings on certain disputed matters do not in any case rely on considerations of witness "demeanor," but instead on my sense of the probabilities, including the probable motives of the main actors at any given moment. I will not address testimonial conflicts about details which I judge are irrelevant.

made up the committee of drivers who met the next morning at about 11 a.m. with Aksland and Matador's president and owner, Burke. Driver Adolfo Garcia Miranda (hereafter, Garcia), another prosecution witness, was not present during any material events on July 25 or 26 because he was absent due to illness. (His undisputed testimony, simply, was that when he came in to the dispatch office for his paycheck on or about "Wednesday," July 27, after a roughly 13-day absence, Matador's dispatcher, Tijerina, told him—in Spanish—that he had been "fired" because he was "with his coworkers.")

The drivers' versions of the July 25 meetings are roughly consistent on material points. Aksland's ultimate version of the same events differs from the drivers' accounts in only small ways for the most part, but is most critically different regarding what happened at the third meeting. (He denies that the drivers offered to accept his proposed interim settlement terms; he denies, moreover, that he made arrangements with them to return to work the next day.) However, another prosecution witness, Tracy Landrus, a police reserve officer called to the scene, offered circumstantial recollections roughly tending to confirm the four drivers' version of their third meeting with Aksland on the night of July 25. The drivers' versions of the July 26 meeting with Aksland and Burke are again roughly consistent on material points, and for the most part their version varies from Aksland's and Burke's own versions only in terms of emphasis or collateral detail.

All pertinent exchanges between the drivers and Aksland or Burke were conducted in English, the native language of the company officials, but a language that even the drivers who functioned as spokesmen for the others could understand and speak only imperfectly.[8] This common phenomenon in California workplaces—especially those associated with the agricultural industry—may have added to the potential for confusion and crossed signals on July 25 and 26 between the drivers and Aksland or Burke, and it probably accounts for a relatively small amount of testimony which is at variance with my findings. However, I don't think that the most distinct testimonial conflicts in the case about who said what during the meetings on July 25 or 26 can be written off as a failure on the drivers' part adequately to understand what they were being told at key moments by Aksland or Burke. Neither do I think that Aksland nor Burke was genuinely confused at any given moment about what the drivers were willing to do or not do at that moment, as distinguished from perhaps being uncertain on July 26 about whether or when the drivers might choose again to strike if their apparently continuing demands for higher pay were not resolved in the "negotiations" process they thought they were beginning when they met on July 26 with Burke and Aksland. Neither do I think that any supposed "language barrier" genuinely stood as an obstacle to resolution of the drivers' pay dispute with the company. Rather, I judge that the real barrier to a resolution was Burke's fundamental unwillingness to live with the interim deal worked out the previous night between Aksland and the drivers, an unwillingness apparently grounded in the fear that the interim deal would leave Matador vulnerable to another strike again if Matador were not willing to satisfy the drivers' continuing demands for higher pay.

[8] The drivers called as witnesses in the trial either acknowledged or implied that all of the drivers as of July 25 spoke Spanish as a first language, and used Spanish when they talked among themselves or with one of their dispatchers, Luis Tijerina. However, based on my observation during the trial, it appears that at least three of the drivers called as witnesses—Alvarez, Reyes, and Gonzales—understand ordinary forms of American English quite well, and can speak it with enough facility to effectively communicate their wishes, intentions, observations, and recollections. Moreover, although driver Alvarado preferred to be examined and to testify through an interpreter, he, too, showed some ability to understand ordinary English words and idioms, and to recapitulate in roughly effective English what he heard others say in English.

B. *The Immediate Setting*

Matador enters into contracts with vegetable processors to haul produce by truck from the harvest field to the processing plant. Its business headquarters are in Vacaville, California. At material times immediately prior to July 25, Matador was performing under a contract with S&K Cannery, located in Lemoore, California, in the San Joaquin Valley, about 200 miles southeast of Vacaville. Matador's contract with S&K required it to haul freshly harvested tomatoes from various growers in the Central Valley counties to the cannery, which was then staffed and equipped to process tomatoes on a 24-hour per-day basis, and counted on a steady inflow of product to justify operating at that level of staffing and readiness. To satisfy those needs, Matador made continuous hauling runs, 24 hours a day, from various growers' fields to the cannery. Outbound, Matador's tractors would haul empty trailers and spot them in the fields, and then hook up to newly loaded trailers for the return run.

The tomato harvest season in the Valley runs from early July through the end of September. Beginning in early July, under otherwise uncertain circumstances, Matador's "personnel office" hired at least 14 drivers—the men named in the complaint—to handle the S&K hauls. It used half of them on the 6 a.m. to 6 p.m. day shift, and the other half for the remaining 12-hour night shift. Depending on the distance between the cannery and the growing field being serviced, Matador paid these drivers either $10 per load or $20 per load. As of July 25, with about 2 months of the harvest season still ahead, the drivers were hauling from the Schwartz Fields, and were getting $10 per load for those runs. The driver-witnesses commonly testified that they had become dissatisfied with this rate because of loading delays at those particular fields, which significantly reduced the number of loads they could haul during each shift, and, in turn, reduced their daily pay to unacceptable levels.[9]

Matador maintained a trailer office on S&K's premises, near the scales and grading station where incoming tomato loads are first weighed and graded before being sent into the plant for further processing and canning. Two Matador dispatchers, Kelly Rutt on the day shift, and Luis Tijerina on the night shift, conducted their dispatching and recordkeeping functions from this trailer. They were often the only Matador personnel on site to handle the routing of the drivers or to deal with them concerning any problems. During the 3-month period Matador was performing under its contract with S&K, Operations Manager Aksland visited the cannery

[9] Alvarez testified without contradiction that "We were not getting enough loads in the day, we'd just get like four loads from that field, that's $40 for the [12-hour] shift."

roughly three times a week, and used the trailer as his office during these visits. He was not a regular presence there, however, for he was also charged with supervising at least one other hauling contract Matador then had with an onion processor farther south in the Valley, near Bakersfield.

Perhaps because the harvest season was still in its early weeks at the time, and because Aksland's and the drivers' jobs had kept them all on the road much of the time, Aksland had not met most of the drivers doing the S&K hauls—and vice versa—prior to the events that brought them together on the evening of July 25. Indeed, it appears that most of the drivers initially believed that evening that Aksland was Matador's "president."

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *July 25 Events*

1. 5:45 to 6:30 p.m.

Although the record does not clearly show when and how the drivers got together to make these plans, there is no dispute that drivers on both the day and night shifts had somehow agreed among themselves by the late afternoon of Monday, July 25, not to make any further runs to the Schwartz Fields until they could meet with a responsible company official to present demands for $20 per load for those runs. Thus, at about 5:30–5:45 that evening, when most of the day-shift drivers had returned to the cannery from the Schwartz Fields, and night-shift drivers were arriving to take over their runs, a group of 10 or 11 of them from both shifts got together near the dispatch office, and some of them told dispatcher Tijerina of their unhappiness with the pay and their unwillingness to work pending a meeting with the company "president." From Alvarez, I find also that a Matador field supervisor, Rene Juvera (known to Alvarez and other drivers as "Ray"), came up to the group and "asked [them] to get the loads back in the fields," but the drivers declined, telling Juvera what they had already told Tijerina—that they were waiting for a meeting with a company official to talk about a pay raise.

From day-shift driver Gonzales, who had returned to the cannery by this point, I find that several trailer loads still remained in the fields. From day-shift driver Alvarado, who had likewise just returned from the fields, I find, in addition, that two or three day-shift drivers were still parked in the fields, waiting, apparently for some word from the others at the cannery about the status of their pay demands. It remains unclear whether the day-shift drivers who had already returned to the cannery had brought a load with them, or had simply deadheaded back in their tractors.

Operations Manager Aksland was then in his car, about 30 minutes' driving distance from S&K's plant. Sometime around 5:45 he got a call on his car phone from Juvera, who reported unspecified "problems" at S&K. Aksland then drove to the cannery, and, upon his arrival at about 6:15, he noticed a large group of drivers standing around or sitting on a truck near Matador's trailer office. Dispatcher Tijerina quickly advised Aksland that the drivers were refusing to go to work until they could talk to someone about a pay raise, and that there were still several day-shift loads waiting to be brought in from the Schwartz Fields.

2. The first meeting and its aftermath

After getting Tijerina's briefing, Aksland went out to meet with the drivers. Alvarez, Alvarado, and Reyes did most of the talking for the drivers. One or more of these spokesmen told Aksland that the drivers wanted a raise, and he replied that he'd like one, too, then asked them how much they wanted. They said $20 per load for Schwartz Fields runs. Aksland said he didn't have authority to grant that raise on his own, only the company owner did. The drivers asked him to call the owner, and Aksland briefly left to place a call to Vacaville. (Aksland testified that he tried to reach Burke by phone, but was unsuccessful.) He returned shortly after this absence, and then suggested an interim solution, which he admittedly announced he was sure would be confirmed by Burke, and therefore one that he could "guarantee": Matador would pay the drivers $15 per load until he got a chance to confer with Burke. He told the drivers also that it wouldn't take more than "three days," or until "Wednesday," July 27, before he could drive up to Vacaville, confer with Burke, and then return with authority to reach a more permanent "resolution" with the drivers.[10] He also implored the drivers to go back to the fields on these terms to pick up waiting loads. At this point the drivers gave no indication that this proposal would be acceptable, and perhaps persisted in arguing that $20 was a fair rate in the circumstances. Aksland told them he was going out with a truck to get a load from the Schwartz Fields, and that they should "think about it" during his absence. Aksland then departed in a truck and was gone from the cannery for upwards of 90 minutes.

Although Aksland may have been unaware of it at the time he departed, at least one day-shift driver in the group at the cannery, Gonzales, got in his own truck and followed Aksland to the fields.[11] Relying primarily on Aksland (echoed in part by Gonzales), I find that when Aksland got to the fields, he found two or three drivers waiting there; he ascertained that they were in contact by cellular phone with an unknown party or parties, and awaiting the outcome of the anticipated negotiations. Aksland made a special offer to

[10] In a declaration dated October 11 furnished to the Board by Matador's attorneys, Aksland averred under penalty of perjury that, "I . . . informed [the drivers] that I had *obtained approval* for a temporary 50% raise for the next two days." (G.C. Exh. 5, p. 3, par. 5; my emphasis.) This suggests, contrary to Aksland's trial testimony, and contrary to what he actually told the drivers, that Aksland had, in fact, gotten "approval" from *someone* for his proposed interim solution. Although I find that Aksland did not, in fact, tell the drivers that he had *obtained* approval for his interim proposal, I think his declaration clearly reveals at least that he had no personal doubt that he could authoritatively assure the drivers that he would live up to his end of the deal if they would return to work on those terms. And his admitted statement to the drivers in the second meeting, infra, that he had given them his "word" on the matter, merely reinforces this impression.

[11] Aksland was sure that none of the drivers at the cannery joined him for another run to the fields, and that when he arrived, there were two or three Matador trucks and drivers simply parked there. However, he believed that one of the drivers in the field was Gonzales, and Gonzales was fully persuasive in his testimony that he, too, went out for another load in response to Aksland's entreaties. Indeed, other driver-witnesses credibly reported that at least two drivers in the group at the cannery followed Aksland out for another run to the fields.

the drivers in the fields to pay them $15 for each load they had already hauled that day and for the loads that still awaited transport to the cannery. This was apparently acceptable to the drivers, for they each hitched up and hauled a load back, as did Aksland.

While all this was going on, the drivers back at the cannery were trying to decide what to do. Primarily from Alvarez' and Reyes' accounts of what happened, I find that the drivers adopted the following plan: They would continue to demand $20 per load and see where it got them, but as a fall-back position, they would accept Aksland's interim proposal of $15 per load pending further negotiations over their pay and a resolution by "Wednesday." As they reached this strategy consensus, however, some among them voiced concern that the Company might just be buying time to arrange to have them replaced and perhaps sent to less desirable work, such as in Bakersfield. These concerns caused them to conclude that they would need some kind of signed promise from Aksland that would not only confirm the $15-per-load temporary arrangement until Wednesday, but would also contain assurances against replacement. They went to dispatcher Tijerina and asked him to write up what it was they wanted. Tijerina took a first stab at it, and presented them with a handwritten statement which read as follows:

> TO WHOM IT MAY CONCERN.
>
> Here, the drivers are in agreement that they will work for $15.00 and that no other drivers will work during that time. Until you come back with an answer. Which is Wednesday.
>
> This agreement is between you *Richard Aksland* and the *drivers*.

After the drivers read what Tijerina had written, however, they decided that it should be reworded, mainly to contain protection not just against replacement, but against discharge, as well. (It was apparently at about this point that driver Reyes, at the request of the other drivers, went to make a phone call to "somebody," to get advice about "what to do in this cases[sic].") In any event, by the point that Aksland returned from his first field haul at about 8 o'clock, the drivers waiting at the cannery had prepared a new writing, which said as follows:

> I [space for Aksland's signature] promise to pay [$]15.00 each load from Schwartz A and Schwartz D Until Wednesday when I will be here in Lemoore with an answer.
>
> And I agree not to fire any driver and not to hire any driver, after the drivers and I get our problems solve[d].

3. The second meeting and its aftermath

When Aksland returned to the cannery at about 8 o'clock, he first spent about 10 to 15 minutes weighing in his load and then moving his tractor-trailer to the staging and grading area where he unhitched the loaded trailer. He was then approached by one of the cannery owners, Salyer, who advised Aksland that he had made contingency arrangements with another tomato-hauling firm to take over the runs for 24 hours, which, said Salyer, would "give you guys time to get yourself regrouped." He also told Aksland that if the Matador drivers didn't plan on going to work, Aksland should tell them to leave the premises, and Aksland agreed to so advise the drivers.[12]

While Aksland was thus engaged, the day-shift drivers who had remained in the fields, plus Gonzales, who had made a special trip back to the fields for another load after the first meeting, arrived at the cannery with their own loads and parked their trucks while Aksland's load was being received. When Aksland was finished with his own check-in and his conversation with Salyer, he went over to join the group of waiting drivers, now numbering about 13, including the recently returned day-shift drivers. (After comparing Aksland's and Gonzales' most deliberate accounts of the sequence and timing of things, I deem it probable that Gonzales and the two or three other just-returned drivers arrived at the cannery at or shortly before the point Aksland walked over to the group of waiting drivers, and that Gonzales then quickly left his truck and himself joined the group soon after Aksland and the drivers had exchanged preliminary remarks described next.)

Aksland asked the drivers if they had considered his interim proposal for $15 per load. The drivers, through one of the spokesmen, said they still wanted $20 per load. Aksland repeated that he had no authority to grant that demand on his own. The drivers soon retreated to their fall-back position and presented Aksland with the writing they had recently prepared. Aksland looked at it and admittedly saw no problem with the recitation of the interim pay arrangement of $15 per load "until Wednesday." But he balked at signing it after he read the last sentence, i.e., "And I agree not to fire any driver and not to hire any driver, after the drivers and I get our problems solve[d]."

Aksland credibly explained from the witness stand that his concern with the latter language was that it might be interpreted as limiting his right to discharge a driver for misconduct in the future. However, he admittedly did not share these concerns with the drivers, or propose counterlanguage of his own; rather, he simply told the drivers he had no authority to sign the paper, and stated that he had given his personal "word" on the matter, and that ought to be enough. Then, after the drivers did not distinctly withdraw their request for him to sign their proposed agreement document, nor otherwise signal their willingness immediately to resume working, Aksland grew more agitated and delivered an ultimatum, the terms of which are the subject of much controversy:

According to Alvarez and Alvarado, Aksland said, in substance, that if the drivers did not climb into their trucks and

[12] According to Aksland's recollection of the timing, this transaction with Salyer did not occur until after Aksland had come back with his second load from the fields, i.e., immediately before his third meeting with the drivers at about 9:15 p.m. On this point, I find, Aksland has simply confused the sequence, for the testimony of the drivers, backed up by officer Landrus as to timing, clearly and credibly shows that it was shortly after their second meeting with Aksland, infra, that they were told to leave the premises, which they did, at about the same time that the police started to arrive, having been initially summoned by a call from S&K at 8:07 p.m. (See also G.C. Exh. 4, the "Incident Case Report," the official police record showing the timing of the initial call for police assistance at S&K.) Moreover, Aksland's apparent confusion as to this point of timing further seems to explain why he insisted, contrary to all other accounts, that during his *third meeting* with the drivers at about 9 p.m., *they were still waiting on S&K's premises.*

get back to work in "five minutes," they would be "fired." However, Gonzales (who, I find, had joined the group by this point) recalled instead that Aksland said, in substance, that if the drivers didn't "want to work," they should "go outside," because "in five minutes," the "police would be arriving." Aksland himself strongly denied using the word "fired," but admits he "probably" told the drivers in the second meeting that they "could be replaced." Moreover, in his declaration furnished to the Board by Matador's attorneys during the investigation, Aksland also recalled telling the drivers that "if they did not return to work, Matador would consider them to have quit voluntarily."

I remain in doubt about the precise nature of Aksland's "five-minutes" ultimatum. Alvarez and Alvarado, who claim he said they would be "fired," seemed sincere in their accounts, but so, too, did Gonzales, whose version is hard to square with the recollections of Alvarez and Alvarado. Moreover, Gonzales' version is separately attractive because it fits well with what the drivers agree happened soon after this (i.e., that Aksland soon drove away in a truck, that S&K agents came out to them and told them to leave the premises, and that the police arrived soon thereafter). Nevertheless, considering Aksland's admissions in his testimony and his pretrial declaration that he told the drivers that if they didn't get back to work Matador would "consider them to have quit voluntarily," and that they "could be replaced," I am reluctant to find that he made no statement to the drivers about where they would stand in the company's eyes if they did not get back to work. On balance, and without accepting any single version as fully accurate, I find it probable that Aksland specifically told the drivers at least that Matador would treat them as having "quit" their jobs if they did not return to work in 5 minutes, and then told them that if they didn't plan to come to work they should leave the premises, because S&K was going to call the police.

Aksland then went to the truck he had just brought in and waited for roughly 5 minutes, during which no other driver came forward. Aksland then took his truck out for another load from the Schwartz Fields, and did not return until sometime around 9 to 9:15 [p.m.].

Shortly after Aksland left, two men the drivers believed were S&K agents approached the drivers and told them that they must take their cars from the trailer area where they had parked them, and leave the premises. (I do not decide whether or not, as some drivers recalled, the S&K agents told the drivers that they must leave because they had been "fired," or were no longer "employed" by Matador.) The drivers, by now numbering about 13, then complied with these directions and grouped themselves on the street outside the cannery entrance. A number of police officers soon drove up and monitored the situation, and one of their number who spoke Spanish talked with the drivers and ascertained the nature of the dispute.

4. The third meeting

When Aksland returned with another load at about 9 [p.m.], the drivers asked one of the police officers at the scene to get word to Aksland that they wanted to talk to him, and one of the officers somehow passed this message along. (According to Alvarez, the drivers had agreed while on the street to "accept" Aksland's interim proposal rather than lose their jobs, and apparently had agreed to accept without further conditions.) Soon after this, Aksland came out to the waiting drivers. Exactly what happened at this point is again in dispute, but I have little hesitation in crediting the harmonious and circumstantially probable testimony of the four drivers who described this meeting (Alvarez, Alvarado, Reyes, and Gonzales), and no hesitancy whatsoever in discrediting Aksland's own confused, unnatural, and seemingly shaped account to the extent it conflicts with that of the drivers. I find as follows.

One or more of the three spokesmen for the drivers (i.e., Alvarez, Alvarado, or Reyes) told Aksland they were now prepared to come back to work on the terms he had proposed, i.e., $15 per load for the "three days." They did not ask him to sign their earlier proposed writing containing additional assurances against replacement or firing; they did not mention the writing at all. Aksland did not immediately reply with any formal words of confirmation, but began to talk about the timing of their return to work. However he soon went back into the cannery building and returned about 5 minutes later. (I infer, despite Aksland's uncertainty on this point, that he went inside to inform Salyer or some other S&K official of this latest development, and to confirm the schedule under which Matador's drivers would take over the driving from the interim hauling firm S&K had located.) On his return, Aksland told the drivers, in the presence of one or more police officers, that they could return the next day, but that due to S&K's having secured a replacement hauler for 24 hours, their return would have to be delayed until 6 p.m. the next day, at which point the night-shift drivers should report to work. He also told the drivers that he would like to meet the next morning at the cannery at 10 o'clock with a committee of three of the drivers, and then find a suitable spot, such as a restaurant, where they might sit down and try to resolve the pay dispute on a permanent basis. The drivers agreed, and Alvarez, Alvarado, and Reyes (the principal spokesmen for the drivers to that point) were somehow selected to make up this committee. Having made these arrangements, Aksland told the drivers they should just go home and spend time with their families, and everyone left the scene for the night.[13]

[13] The gist of Aksland's version is as follows: The drivers told him they wanted him to sign their earlier-proposed written agreement as a condition of their returning to work. He rebuffed this, and told them in any case that there would be no work available for Matador until 6 p.m. the next day, due to S&K's having secured a 24-hour replacement hauler. He did not tell the drivers they should report at 6 o'clock the next evening, however; rather, he proposed to bring Burke down from Vacaville the next morning to meet with a committee of three of the drivers to see if they could resolve the dispute. The drivers agreed, and everybody went home for the night.

While parts of this version are not inherently improbable, I find it decidedly improbable, as Aksland claimed, that Aksland made a date for a meeting in Lemoore the next day between the drivers and *Burke*. (By contrast, the drivers uniformly testified that the only thing Aksland mentioned about a meeting the next day was that *he* wanted to meet with a committee of drivers, and that they parted company with the understanding that *he* would meet their committee at the cannery the next morning at 10 o'clock.) Aksland admittedly had not yet made contact with Burke when he supposedly made this commitment on Burke's behalf, and his explanatory claim that he was nevertheless confident he could persuade Burke to travel to Lemoore the next day flies in the face of the story he has otherwise

Continued

C. *July 26 Events*

Aksland called Burke at about 5:30 or 6 a.m., and briefed him on the situation. Although I don't think we got a candid or complete account from either of them about the details of this briefing or of Burke's reaction, I find—as they both agree—that Aksland reported to Burke what had happened the night before. (In this regard, however, I infer that Aksland truthfully reported to Burke what I have found actually happened the night before, including the denouement after his third meeting with the drivers—namely, that the drivers had agreed to return on a temporary, $15-per-load basis, pending further negotiations over their ongoing demand for $20 per load.) Burke admittedly told Aksland that the Company had to be prepared with an alternative arrangement to cover its contract with S&K, and that they would need to start calling owner-operators. Then Aksland either agreed to become involved in the meeting with the drivers Aksland had already arranged, or (more likely in my view, in the light of ensuing events) he decided himself to become involved, because he was dissatisfied with the interim commitments Aksland had by then made, and wished to extricate the Company from those commitments.[14]

After getting off the phone with Aksland, Burke and an office assistant, Amy Mason, began to call trucking services to line up owner-operators to take over Matador's hauling work at S&K, scheduled to resume at 6 p.m. that day. But Burke had not confirmed this replacement arrangement with any of the owner-operators, pending the outcome of his meeting with the drivers, and when he left Vacaville that morning, Mason was still in the process of making these calls.

Having thus set these wheels in motion, Burke flew down in his private aircraft from Vacaville to an airport near Lemoore, where Aksland picked him up and then drove him to the cannery. There, he and Aksland first met inside the cannery with S&K's Salyer, where they confirmed with Salyer that Matador's work would be "covered" by S&K's interim hauler until 6 p.m. Burke and Aksland then came outside and met with a group of the drivers. They quickly arranged to hold followup discussions in a nearby park with the committee of three of them—Alvarez, Alvarado, and Reyes.

The witnesses' memories are strikingly different concerning some features of the meeting at the Lemoore park, not least as to how long it lasted. Reyes estimated that between 30 and 45 minutes passed before it broke up; by contrast, Burke and Aksland recall it as quite short, no more than 10 minutes. For reasons noted below, I judge that it was effectively over quite soon, almost certainly within less than 5 minutes.

Because the witnesses seem to agree on this much, I find as follows: Burke was the first to speak; he asked the committee what the drivers wanted. One or more drivers reiterated that they wanted $20 per load. Burke, without making any counteroffer, claimed he couldn't pay that much. They argued briefly about the fairness of that amount, and the drivers repeated their complaints about loading delays at the Schwartz Fields. Burke never made a specific counterproposal. (At most, I might find, based on the drivers' harmonious recollections on the point, that Burke may have wondered aloud whether it would be satisfactory to pay drivers $15 for all loads, including those for which Matador was currently paying $20—a notion that the drivers quickly objected to as putting them back where they had started.)[15] Moreover, I note the absence from either Burke's or Aksland's accounts of any claim that the drivers ever affirmatively voiced a refusal to return to work on Aksland's interim terms, as distinguished from indicating that they still wanted $20 per load.[16] In addition, as I have noted, Burke

stood by—that he had been assuming all along that he would need until "Wednesday" (the 27th) to resolve the dispute with the drivers, because it would take him that long to drive up to Vacaville, confer there with Burke, and then return to the cannery with authority to make a more permanent deal with the drivers. Therefore, it is quite improbable that Aksland would have decided on the spot in the third meeting to commit Burke to a trip that, until then, Aksland had planned himself to make. I don't think this decision was made until the next morning, when Burke, unhappy with Aksland's reports of his interim deal with the drivers, decided himself to fly down to Lemoore to work out either a better deal for the Company or, failing that, to dismiss the drivers and bring in the owner-operators he had admittedly already started to line up before he got in his plane.

[14] Explaining his decision to fly down to Lemoore, Burke claimed that he wanted to find out firsthand what the dispute was "really" about, and was interested in resolving the dispute, once he more clearly ascertained the drivers' intentions or wishes. I observe that it took no particular astuteness on Burke's part to know that the underlying issue was money—how much to pay the drivers. I have inferred, moreover, that he also knew by then that the drivers were prepared to return on the basis of Aksland's interim, $15-per-load terms, pending further negotiations about their demand for $20 per load. Accordingly, I remain uncertain exactly what Burke meant when he said that his trip was prompted by a desire to find out what the drivers "really" wanted. And while I accept that Burke was clearly motivated enough by the prospect of a "resolution" to get in his plane and fly down to the meeting, I remain entirely unsure after making many attempts to get Burke to be clear on this point, exactly what kind of "resolution" Burke envisioned, or what offer he was prepared to make to get the dispute resolved. Indeed, after studying his rambling and opaque testimony concerning his motivations and intentions when he traveled to the meeting with the drivers, and his account of the meeting itself, the impression persists that he had no willingness whatsoever to "negotiate" with the drivers, but simply wished to present them with the alternative of either returning to work on preexisting terms (and not Aksland's interim terms, at that) or be treated as "quits."

[15] I place little weight on Aksland's unique recollection that at one point, Burke made reference to Aksland's interim offer of $15 per load for Schwartz field runs, and that the drivers affirmatively rejected that amount as not "good enough." Aksland was himself unsure whether or not Burke was actually presenting the $15 amount as a "permanent offer," or simply remarking about the events of the night before, and in that context offering his opinion that the amount Aksland had proposed as an interim rate seemed like a "fair" offer. Moreover, Burke implicitly contradicted Aksland insofar as he suggested that Burke's last offer was for $15 per load. Thus, Burke admits that after the drivers had signaled that they still wanted $20 per load, he said to them: "We can't give you a raise. The old rate would have to stay, you know, in order to continue to work." Tr. 309:12–14. Clearly, although Burke subsequently waffled on the point, this statement amounted to a rejection even of Aksland's interim, $15-per load deal with the drivers.

[16] When Burke or Aksland attempted to narrate the events of the meeting they never claimed that the drivers had affirmatively declared their unwillingness to *return to work* unless they got $20 per load. The only suggestion that the drivers may have voiced some kind of refusal to return is in Burke's affirmative answer to the fol-

admittedly said to the drivers, "We can't give you a raise. The old rate would have to stay, you know, in order to continue to work."—a statement which amounted to a cancellation of the interim deal that they had agreed on with Aksland. Finally, consistent with the drivers' memories, Burke recalled—and I find—that at some point soon after these initial exchanges, when the drivers did not retreat from their demand for $20 per load, he told them again he could not afford to pay that much, and then said to them:

> It appears that you have quit your jobs, and now we have to replace you. And . . . we [are] in the process of doing that.

The witnesses commonly agree that this statement was uttered by Burke at an early point in the meeting. I judge that it was at this point—clearly no more than 5 minutes after the meeting began—that the meeting effectively ended. Burke had declared his intentions to treat the drivers' work stoppage as a "quit," and had obviously decided at this point that it was now time to confirm the arrangements for the owner-operators to come in. However, I credit the drivers' roughly consistent memories that the drivers then protested that they had not "quit," and, in fact, that Aksland had "fired" them the night before. And possibly it was in this context, as witnesses from both sides seem to agree, that there was some further, quite inconclusive, discussion or debate about the events of the previous evening.

As soon as the meeting ended, Burke called back to Vacaville and told Mason to confirm the substitution arrangements with the owner-operators she had lined up, which she did. By 6 p.m., the owner-operators ("about 15" in number, according to Burke) had arrived in Lemoore, and they took over all the hauling work to S&K for the roughly 2-month balance of the tomato harvest.

III. AFTERMATH

Although it only marginally affects the merits, two additional events are worth noting: On the afternoon of July 26, and for some additional period of days thereafter, several of the former drivers picketed at the cannery with signs which, according to Alvarez, carried messages printed in English to the effect, "We want our jobs back, and we will accept the $5 raise." And on July 27, as noted earlier, Garcia appeared at Matador's trailer at the cannery and was told by dispatcher Tijerina in Spanish that he had been "fired."

In this latter regard, I reject as spurious two claims Matador makes on brief (both at p. 22) regarding Garcia's testimony: First (using the name "Miranda" to refer to Garcia), Matador's counsel argues that Garcia's testimony "should not be credited since there is an absence of real coherence in [his] account of the incident." On the contrary, Garcia's account was simple, straightforward, and unswervingly coherent. Second, counsel argues that "the evidence is clear that Matador's dispatcher had no authority to inform an employee regarding the reasons for their [sic] separation from employment."[17] In fact, the "evidence" shows no such thing, and the transcript passage cited by counsel in support of this assertion (generalized testimony of Aksland at Tr. 279: 17–25) is silent on the point. Moreover, this record makes it rather clear that dispatchers were the only Matador personnel continuously on site at the cannery who were in a position to transmit directions to the drivers and respond to their concerns, and who served as conduits for management instructions from afar. And from these features of Tijerina's job, I would find that when Tijerina told Garcia he was "fired because he was with his co-workers," he was speaking about "a matter within the scope of [his] agency or employment," and, therefore, that his statement to Garcia was a nonhearsay "admission" by Matador even if Tijerina had no express "authority" to inform Garcia of the reason for his "separation from employment."[18]

However, I think the most significant feature of Garcia's undisputed testimonial revelations is the fact, as Matador's counsel implicitly admits, that he was, indeed, "separated from his employment" as a consequence of what Matador now calls its lawful "replacement" of the drivers who were supposedly still on strike. Because of Garcia's prior absence due to illness, however, Matador never had any reasonable basis for supposing that Garcia was, in fact, aligned with his "co-workers" in the sense of being party to the strike decision of July 25, much less that he was a striker at the time that Matador nevertheless "replaced" him with an owner-operator. At best, it appears, Matador's officials simply assumed that Garcia was somehow in solidarity with the other drivers, and decided to terminate him, too, because of that presumed association. Accordingly, given Garcia's treatment, I am led again to doubt Matador's lately-arrived-at position that Burke genuinely believed that he had an ongoing "strike" on his hands when he peremptorily declared to the drivers' committee on July 26 that he was now calling in the owner-operators to take over their jobs.

IV. CONCLUDING ANALYSIS

As both parties now recognize, the drivers' work stoppage of July 25 was a classic form of concerted activity—a strike in support of pay demands—which is not only clearly pro-

lowing leading question by Matador's counsel (my emphasis): "Did the drivers tell you that they would not return to work *for their old wages*? (Tr. 312:5–12.) In the circumstances, I give this answer no weight. I also specifically reject Burke's seemingly improvised claim that during this meeting the drivers held out as an additional condition of any return to work that Burke must sign the "contract" document they had presented to Aksland during their second meeting the night before. (Aksland himself contradicted Burke on this point, saying that, "[t]his [the contract the drivers had presented on July 25] wasn't brought up that morning from the drivers or from us." Tr. 289:13–14.) Rather, if any of the participants in the meeting talked at all about the matter of signing a document, I deem it probable that this would have come up only after Burke had already declared that the drivers, having "quit," were being replaced with owner-operators—and then, only in the context of rehashing what had happened the previous evening.

[17] The official translator reported that the Spanish verb form used by Garcia which the translator rendered into English as *fired* was based on the infinitive *despedir*, which the translator acknowledged could also be rendered in English as "to separate from employment." It is the latter translation which Matador's counsel embraces on brief as somehow comforting. My dictionary (Collins Pocket Spanish Dictionary, Sixth Reprint, Great Britain, 1986) confirms that either translation is appropriate; however, I have no basis for doubting the translator's initial choice to render the word in question as *fired*.

[18] Rule 801(d)(2)(D), Fed.R.Evid.

tected activity under Section 7, but the subject of "repeated solicitude" throughout the Act's provisions. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). Thus, Matador concedes that it could not lawfully discharge the drivers for striking, and denies that it ever did so. Rather, Matador now pins its defense on the unexceptionable legal proposition that it had a right to "permanently replace" any strikers who had not made an unconditional offer to return to work on the employer's lawful terms prior to their actual replacement,[19] and on the factual proposition, hotly disputed by the General Counsel, that the drivers had not made such an unconditional offer before Burke announced to them on July 26 that they were being replaced. And on that interpretation of the facts, Matador relies centrally on *Browning Manor Hospital*, 279 NLRB 1176 (1986), in which the judge, sustained by the Board, found that the strikers had never made an "unconditional" offer to return prior to their replacement, and, therefore, the employer's refusal to reinstate the strikers was legally privileged. Id. at 1181–1183.

Thus, as I noted at the outset, the central question now dividing the parties is whether or not the drivers did, in fact, unconditionally offer to return to work on Matador's lawful terms before Burke played the replacement card. I have found that they did—during their third meeting with Aksland on the night of July 25, when they accepted without reservation Aksland's proposal to resume their work at $15 per load pending further negotiations for a resolution of the pay dispute. In these circumstances, the law is clear: Matador's right to permanently replace the strikers "[did] not extend to withholding from them the right to return to their *unoccupied* jobs simply because they have gone out on strike." *American Linen Supply Co.*, 297 NLRB 137 (1989). Accordingly, I conclude that Matador lost the right to play the replacement card when the drivers reached their back-to-work agreement with Aksland.

I recognize that a different conclusion might be appropriate if the record credibly showed that the drivers' committee on July 26 somehow clearly indicated by their statements or actions that they were no longer willing to return to work on the basis of the deal they had made with Aksland the night before. However, I have noted that even under Burke's and Aksland's versions of the July 26 meeting, the drivers never affirmatively declared that they were now scrapping the interim deal—only Burke appears to have done that. And in this regard, I observe that the drivers' ongoing demand during this brief meeting for $20 per load was not inconsistent with their willingness to return under the interim terms they had worked out with Aksland the previous evening. Thus, I judge that from the drivers' perspective, their meeting with Burke on July 26 simply represented the opening round of promised negotiations for a more permanent settlement of their pay dispute, and their pay demands were put forth with that appreciation of the situation in mind, and were not intended as a renunciation of the interim back-to-work agreement. Moreover, for reasons I have noted earlier, I don't believe that Burke ever entertained any genuine doubt about the drivers' willingness to return for $15 per load pending further negotiations. Rather, I have inferred that Burke judged that to reinstate them on those terms would leave him vulnerable to *another* strike in the future if he could not reach a permanent accord with them, and for this reason, he simply decided, on-the-spot, to scrap the interim deal, to advance instead the threadbare claim that the drivers had already "quit," and to go forward with contingency arrangements he had already initiated to replace the drivers with owner-operators. And I note finally in this regard that Burke admittedly had not confirmed any replacement arrangements with the owner-operators at the time he made his declaration to the drivers' committee that they had quit and were being replaced.

In the circumstances, where the drivers were not, in fact, still on strike at the time Burke made his peremptory declaration that they had quit and were being replaced by owner-operators, I conclude that Burke effectively discharged the drivers in contravention of their right to be promptly returned to their still-vacant jobs upon their unconditional offer to return. Accordingly, I find that by thus discharging the drivers on July 26, Matador violated Section 8(a)(1), substantially as alleged in the complaint.[20]

[19] See generally *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); and *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[20] As I have noted earlier, the complaint alleges that Matador discharged the drivers "on or about July 25." The General Counsel still argues that the discharge occurred on July 25, but in any event, no later than July 26, as I have just found. In support of the claim that the discharge occurred on July 25, the General Counsel makes two, alternative arguments: His first argument relies on the testimony of some of the drivers that Aksland told them during the second meeting on July 25 that if they weren't back in their trucks in "five-minutes" they would be "fired." I am not persuaded that Aksland made such a statement, and I will deal no further with that argument. The General Counsel argues in the alternative that even under Aksland's version of the "five-minutes" ultimatum on July 25, he at least told the drivers at that point that they would be treated as having "quit" if they did not immediately end their strike, and that this admitted statement was tantamount to a discharge of the drivers. And in this regard, the General Counsel relies on *Apex Cleaning Service*, 304 NLRB 983 (1991), where the Board found that the employer effectively discharged its employees in violation of Sec. 8(a)(1) when it ordered employees who had stopped work over a pay dispute to leave the premises and threatened to call the police if they didn't leave, and later contended in unemployment compensation proceedings that the employees had "quit." Id. at 985–986. However, as the Board noted in Apex, "[t]he test to be used is whether the [employer's] acts reasonably led the strikers to believe they were discharged." Id. at 983 fn. 2, quoting *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982). And here, despite the fact that Aksland admittedly made a "quit" statement to the drivers at around 8:00 that evening, I have found that by the end of the evening, after their third meeting with Aksland, the drivers clearly "believed," correctly, that they still had their jobs and would resume them the next evening on the back-to-work terms they reached with Aksland during their third meeting. Accordingly, I find no merit to this alternative contention. Rather, I regard Burke's July 26 statements (in effect, "You quit, so we're bringing-in owner operators"), and only those statements, as sufficient in the circumstances reasonably to cause employees to believe that they had been discharged. Moreover, inasmuch as I have found that the drivers had, in fact, ended their strike when Burke made these statements, I do not decide whether Burke's statement would have amounted to an unlawful discharge of the drivers even if they were still on strike at the time.

REMEDY

Having found that Matador committed an unfair labor practice when it discharged all 14 drivers named in the complaint because of their previous strike activities (or, in Garcia's case, based on his perceived association with the drivers who actually participated in the strike), I find that it must be ordered to cease and desist from such acts or from like or related violations, and to take certain affirmative action designed to effectuate the policies of the Act, and to restore the status quo ante. Thus my order requires Matador to post a conventional remedial notice in English and Spanish at its workplaces, and to mail copies of that notice to the discharged employees. It also provides that Matador must purge its personnel records of any reference to the discharged drivers as "quits," or any other references to their discharges, and to notify them in writing that it has done so. Finally, my order requires Matador to offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]